

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA	:	
	:	
v.	:	Docket No. 2:03-cr-49-01
	:	
DONALD SMITH,	:	
	:	
Defendant.	:	

MEMORANDUM AND ORDER

On September 12, 2003, Defendant Donald Smith pled guilty to one count of bank robbery in violation of 18 U.S.C.A. §§ 2, 2113(a) (West 2000). A sentencing hearing was held in this Court on May 26, 2004. Because Smith brandished a dangerous weapon during the robbery, the Court increased the offense level by three levels. The Court also determined that due to his obstructive conduct following the offense, Smith was not entitled to a downward adjustment for acceptance of responsibility pursuant. Finally, the Court granted the Government's motion for an upward departure because Smith's criminal history category under-represented the seriousness of his criminal past and his likelihood of recidivism. The Court writes here to clarify the reasoning supporting these conclusions.

I. Background

A. The Robbery

On December 30, 2002, Smith and his girlfriend, Rosa Cruz,

drove to Vermont from Springfield Massachusetts in a white Chevrolet Malibu. At approximately three o'clock, Smith and Cruz stopped to see Smith's friend, Todd Davison at Davison's furniture shop in Bondville, Vermont. Smith and Davison discussed robbing a bank. Although Davison did not want to participate in the robbery, he did fashion a fake gun for Smith by cutting two angle pieces of wood into an "L" shape. When he and Cruz left Davison's shop, Smith brought the fake gun with him.

Shortly before four o'clock Smith and Cruz drove to Jamaica, Vermont and parked down the street from the Town's Charter One Bank branch. Smith left Cruz in the driver's seat of the car and entered the bank. In the bank that afternoon were two tellers, Jennifer Ucci and Betty Jo Chartier. Smith approached the teller windows with his hand concealed in his sweatshirt pocket. He pointed either his concealed hand or a concealed object at the tellers and instructed them to give him money. Chartier believed Smith had a gun in his pocket. Ucci was unsure if Smith had anything in his pocket, but she believed his concealed hand was threatening. The tellers handed Smith approximately \$8,500 in cash. Smith then fled the bank and he and Cruz escaped from Jamaica in the Malibu. Although Smith's appearance was obscured by the hood of his sweatshirt and his sunglasses, his plan was far from perfect. Chartier, who had known Smith for a number of

years, was able to identify Smith by his voice. Ucci was able to observe the getaway car.

B. Obstructive Conduct

On January 15, 2003, Smith was arrested on bank robbery charges and detained pending trial. While incarcerated, Smith had a number of telephone conversations with an associate, Dale Lataille. Corrections officials recorded these conversations. Smith's conversations with Lataille revealed two separate attempts to obstruct justice. First, prior to his arrest Smith attempted to hide Cruz from law enforcement by placing her in two drug rehabilitation centers.¹ Smith was concerned that Cruz would be able to tell law enforcement officers about the bank robbery. After his arrest, Smith asked Lataille to contact Cruz and instruct her to avoid the police; Lataille complied.

Second, Smith requested that Lataille contact Chartier and attempt to influence her testimony. Over the course of a series of phone conversations, Smith instructed Lataille to contact Chartier, identify himself as a private investigator or friend working on Smith's behalf, and inquire as to whether Chartier was certain that she recognized the robber's voice as belonging to Smith. Lataille was to state that if Chartier testified, Smith would reveal embarrassing information he allegedly possessed

¹ Smith first placed Cruz in the Brattleboro Retreat in Brattleboro, Vermont and later moved her to the Carlson House in Springfield, Massachusetts.

about Chartier. Again, Lataille complied with Smith's request and eventually contacted Chartier by telephone. Frightened by the telephone call, Chartier notified law enforcement officials.

C. Criminal History

According to the Presentence Report ("PSR"), Smith's criminal history contained the following adult convictions:

DATE OF ARREST	OFFENSE	SENTENCE
01/04/65	Attempted larceny	6 months imprisonment, suspended with probation
01/18/65	Use without authority	unknown
01/10/66	Breaking and entering at night	9 months imprisonment
08/09/66	Hitchhiking on thruway	10 days imprisonment
09/23/66	Larceny	6 months imprisonment
02/27/67	Uttering a forged instrument	2 months imprisonment, suspended
01/24/68	Non-support	Default judgment
03/02/68	Robbery	6 months to 10 years imprisonment
07/21/68	Escape	1 year imprisonment
09/13/68	Escape	1 year imprisonment
01/16/74	Aggravated assault	1 year imprisonment
04/26/76	Interstate transportation of a stolen vehicle	2 years imprisonment

03/29/78	Mail fraud	18 months imprisonment
05/10/78	Robbery	2 to 4 years imprisonment
05/11/82	Larceny/assault and battery against a special police officer	Unknown
07/01/82	Armed bank robbery	15 to 25 years imprisonment ²
12/01/89	Possession of a Class D. Substance	6 months imprisonment

In addition to these convictions, there is reliable evidence indicating that Smith was involved in the trafficking and sale of illegal narcotics prior to the 2002 bank robbery.

II. Discussion

The sentencing recommendations in the PSR are summarized as follows.³ The guideline for the offense was found in USSG § 2B3.1; the base offense level was twenty. The offense involved taking property from a financial institution, therefore, the offense level was increased by two levels pursuant to USSG § 2B3.1(b)(1). Because Smith brandished a dangerous weapon during the robbery, the offense level was further increased by three levels under USSG § 2B3.1(b)(2). The offense level was raised an

² Smith served approximately thirteen years in Massachusetts state prison before he was released in 1995.

³ The sentence was calculated under United States Sentencing Commission, Guidelines Manual (Nov. 2003).

additional two levels under USSG §3C1.1 because Smith obstructed justice. Smith did not demonstrate acceptance of responsibility and therefore was not entitled to a downward adjustment pursuant to USSG § 3E1.1. The resulting adjusted offense level was twenty-seven.

The PSR determined that Smith had three criminal history points based on the 1982 armed bank robbery. Pursuant to USSG § 4A1.2, the PSR did not calculate the remaining criminal convictions due to their age.⁴ Smith's resulting criminal history category was II. The imprisonment range under the Guidelines for an offense level of twenty-seven and a criminal history category of II was seventy-eight to ninety-seven months. The range for a term of supervised release was not less than two years but not more than three years. USSG § 5D1.2.

Smith objected to the upward adjustment for brandishing a

⁴ In relevant part, USSG § 4A1.2(e) provides:

(1) Any prior sentence of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant's commencement of the instant offense is counted. Also count any prior sentence of imprisonment exceeding one year and one month, whenever imposed, that resulted in the defendant being incarcerated any part of such fifteen-year period.

(2) Any other prior sentence that was imposed within ten years of the defendant's commencement of the instant offense is counted.

(3) Any prior sentence not within the time periods specified above is not counted.

dangerous weapon and the denial of credit for acceptance of responsibility, but did not contest the adjustments for taking property from a financial institution and obstruction of justice. For its part, the government moved for an upward departure pursuant to USSG § 4A1.3, because Smith's criminal history level under-represented his criminal past and his likelihood of recidivism.

A. Brandishing a Weapon

Smith argued that an adjustment for brandishing a dangerous weapon was unwarranted because there was no evidence that Smith used a firearm or dangerous weapon. Smith further asserted that there was insufficient evidence for the Court to conclude that he used the fake wooden gun or had anything in his pocket other than his hand.

Section 2B3.1 of the Guidelines permits a three-level enhancement "if a dangerous weapon was brandished or possessed" during a robbery. USSG § 2B3.1(b)(2)(E). Section 2B3.1 refers to USSG § 1B1.1 for definitions of "dangerous weapon" and "brandished." Id. cmt. n.1. According to that provision, "brandished" means

that all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to another person, in order to intimidate that person, regardless of whether the weapon was directly visible to that person. Accordingly, although the dangerous weapon does not have to be directly visible, the weapon must be present.

USSG § 1B.1.1 cmt. n.1(C).

A "dangerous weapon" is defined as

(i) an instrument capable of inflicting death or serious bodily injury; or (ii) an object that is not an instrument capable of inflicting death or serious bodily injury but (I) closely resembles such an instrument; or (II) the defendant used the object in a manner that created the impression that the object was such an instrument (e.g., a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).

Id. cmt. n.1(D).

The Second Circuit has held that "objects that appeared to be dangerous weapons, rather than actual firearms" were properly designated as "dangerous weapons" under USSG § 2B3.1(b)(2)(E).

United States v. Matthews, 20 F.3d 538, 554 (2d Cir. 1994)

(upholding a district court's determination that a toy gun used in a robbery was a "dangerous weapon" under the guideline); see also United States v. Kirvan, 86 F.3d 309, 314-15 (2d Cir. 1996)

(an antique gun used in a robbery is a "firearm" under section 2B3.1(b)(2)(C)). Other courts have also applied the enhancement when the object at issue only appeared to be a dangerous weapon.

E.g., United States v. Farrow, 277 F.3d 1260, 1266 (10th Cir.

2002) (hand in sweatshirt with pointed finger); United States v.

Hart, 226 F.3d 602, 608-09 (7th Cir. 2000) (shoe box and lunch

box portrayed as bombs); United States v. Vincent, 121 F.3d 1451, 1455-56 (11th Cir 1997) (hard object pressed against victim's

side); United States v. Dixon, 982 F.2d 116, 121-24 (3d Cir.

1992) (hand in towel).

In Farrow, the Tenth Circuit noted that "[c]ases applying a less restrictive approach in determining what object can appropriately be considered a 'dangerous weapon' under the guidelines are uniformly predicated on the underlying policy that even the perception of a dangerous weapon has the potential to add significantly to the danger of injury or death." Farrow, 277 F.3d at 1267; see also Dixon, 982 F.2d at 124 ("Police responding to the crime or the victims of the crime could easily have retaliated violently because of the immediate threat they perceived."); Vincent, 121 F.3d at 1455 ("[T]he danger of a violent response that can flow from pretending to brandish, display or possess a simulated weapon in perpetrating a robbery is just as real whether the object is a toy gun, or a concealed body part.").

The Court agrees with this policy analysis, but adds a further consideration: the impact on the victim. An object manipulated so that it appears to be a dangerous weapon can cause as much fear and distress to the victim of a violent crime as an actual weapon. Accordingly, the Court concluded that it was unnecessary to determine whether Smith held the wooden gun in his pocket or simply pointed his finger; either could be considered a dangerous weapon under USSG § 2B3.1(b)(2)(E).

The Court next evaluated whether Smith's concealed hand or

wooden gun either closely resembled or created the impression of a dangerous weapon. Smith cited the Tenth Circuit's decision in Farrow, arguing that the Court should adopt an objective standard that would ask "whether a reasonable person, under the circumstances of the robbery, would have regarded the object that the defendant brandished, displayed or possessed a dangerous weapon.'" Farrow, 277 F.3d at 1268 (quoting Hart, 226 F.3d at 607)). Smith distinguished Farrow and other precedents on the grounds that Smith was polite and soft-spoken during the robbery and never stated that he had a gun. According to Smith, under these circumstances it was not reasonable for the bank tellers to conclude he held a dangerous weapon.

It is undisputed that from the standpoint of the tellers, Smith possessed an object that appeared to be a dangerous weapon. Chartier believed Smith had a gun and Ucci understood his concealed hand to be threatening. Accepting, *arguendo*, the objective standard urged by Smith, the tellers' conclusion was reasonable. Prior to the robbery, Smith had a wooden object fashioned to resemble a gun in order to commit a bank robbery. During the course of the stickup, Smith kept his hand concealed in his pocket, pointed his hand or the wooden gun through his pocket at the bank tellers and demanded money. At the sentencing hearing, Smith admitted that when he pointed his concealed hand at the tellers, he intended it to look as though he had a gun.

Thus, the Court concluded that to a reasonable person, the object Smith brandished would have closely resembled or created the impression of a dangerous weapon.

B. Acceptance of Responsibility

Smith did not dispute that he engaged in obstructive conduct which warranted a two-level increase in the offense level pursuant to USSG § 3C1.1. Smith nevertheless maintained that he was entitled to a downward adjustment for acceptance of responsibility under USSG § 3E1.1. The Second Circuit has repeatedly held that absent "extraordinary circumstances" a defendant found to merit an obstruction-of-justice adjustment is not entitled to credit for acceptance of responsibility. E.g., United States v. McLeod, 251 F.3d 78, 83 (2d Cir. 2001); USSG § 3E1.1, cmt. n.4. Subsequent to his arrest, Smith deliberately and systematically attempted to influence the testimony of both Cruz and Chartier. Such conduct cuts to the heart of the criminal justice system. Although the Court accepted Smith's statements of remorse as truthful, these statements did not constitute an extraordinary circumstance. Indeed, had the Court awarded Smith credit for acceptance of responsibility, it would be difficult to imagine any set of circumstances that would warrant denying such credit.

C. Upward Departure Based on Criminal History

The government moved for a departure to a higher criminal

history category pursuant to USSG § 4A1.3. Such a departure is warranted “[i]f reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant’s past criminal conduct or the likelihood that the defendant will commit other crimes.” USSG § 4A1.3, p.s. In determining whether to depart under § 4A1.3, the court may consider sentences imposed outside the time period proscribed by § 4A1.2(e), “if the court finds that [the sentences are] evidence of similar, or serious dissimilar, criminal conduct.” USSG § 4A1.2, cmt. n.8.

The Second Circuit has stated that “the inadequacy of a defendant’s criminal history category is not merely a permissible basis for an upward departure, it is . . . an ‘encouraged’ basis for such a departure.” United States v. Simmons, 343 F.3d 72, 78 (2d Cir. 2003) (quoting Koon v. United States, 518 U.S. 81, 94-95 (1996)). The Second Circuit has also upheld an upward departure under § 4A1.3, based in part on the defendant’s pattern of frequent criminal convictions, many of which were outdated. See United States v. Diaz-Collado, 981 F.2d 640, 643-44 (1992).

Smith has an extensive history of serious and often violent criminal conduct. Most of Smith’s life has followed a single pattern: he re-offends shortly after being released from prison. Between 1965 and 1989 Smith amassed eighteen criminal convictions, despite having spent most of his adult life in

prison. The nature of Smith's previous offenses is perhaps even more significant than their pattern and number, however. In addition to his most recent conviction, Smith has three previous robbery convictions, including one for armed bank robbery, indicating a particular penchant for this type of crime. Furthermore, Smith has additional convictions for violent crimes ranging from escape to assault and battery. Such a history demonstrates Smith is either unwilling or unable to live within the law; he has made a career out of criminal conduct.

For these reasons, the Court concluded that Smith's extensive criminal history and extraordinarily high likelihood of recidivism were inadequately represented by criminal history category II. When departing upward pursuant to section 4A1.3, the district court must "(1) determine which category best encompasses the defendant's prior history and (2) use the corresponding sentencing range for that category to guide its departure.'" United States v. Stevens, 985 F.2d 1175, 1185 (2d Cir. 1993)(quoting United States v. Cervantes, 878 F.2d 50, 53 (2d Cir. 1989)); see also USSG § 4A1.3, cmt. n.2(B) ("In considering a departure under this provision, the Commission intends that the court use, as a reference, the guideline range for a defendant with a higher or lower criminal history category, as applicable."). With respect to a departure of more than one category, a sentencing court "is not required . . . to pause at

each category above the applicable one to consider whether the higher category adequately addresses the seriousness of the defendant's record." Simmons, 343 F.3d at 78. A mechanistic approach is not required "as long as the reasons for such a departure are fully explained." Id.

In calculating the extent of the departure, the Court relied on a number of factors. First, the Government averred that absent the time limitations imposed by USSG § 4A1.2(e), Smith would have twenty-seven criminal history points under the Guidelines. Although the Court was unwilling to calculate Smith's sentence as though § 4A1.2(e) did not exist, Smith's theoretical criminal history score proved a useful benchmark for determining which criminal history category was most applicable. Second, the Court relied on the nature, pattern and sheer number of Smith's previous convictions. Finally, the Court concluded that Smith's drug activity prior to the 2002 bank robbery provided further evidence of his likelihood to re-offend. Accordingly, the Court determined that criminal history categories III through VI inadequately represented Smith's criminal history and likelihood of recidivism. Therefore, from offense level twenty-seven and criminal history category VI, the Court departed an additional two offense levels to level twenty-nine. See USSG § 4A1.3(a)(4)(B). The sentencing range for offense level twenty-nine and criminal history category VI is

151-188 months. Smith was sentenced to fifteen to twenty-five years for his prior armed bank robbery, of which he served thirteen years. The Court determined that it would be inappropriate for Smith to receive a lesser sentence for his subsequent armed bank robbery and consequently sentenced him to 188 months of imprisonment.

III. Conclusion

For the reasons set forth above, the Court sentenced Smith to 188 months in prison followed by three years of supervised release.

Dated at Burlington, Vermont this ____ day of June, 2004.

William K. Sessions III
Chief Judge, U.S. District Court

